



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2004

Mr. Steve Aragón
General Counsel
Texas Health and Human Services Commission
P. O. Box 13247
Austin, Texas 78711

OR2004-7111

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208502.

The Texas Health and Human Services Commission (the "commission") received a request for the personnel files of two named individuals. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed evaluations made of, for, or by the commission. Accordingly, you must release these evaluations under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 or are expressly confidential under other law. You argue that the submitted information is excepted from disclosure under section 552.103. This section is a discretionary exception to

disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (government body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103); 522 at 4 (1989) (discretionary exceptions in general). Therefore, you may not withhold the evaluations we have marked under section 552.103 of the Government Code.

However, section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). For employees who timely elected to keep their personal information confidential, you must withhold the submitted social security numbers in the section 552.022 information under section 552.117(a)(1) of the Government Code. The commission may not withhold this information under section 552.117(a)(1) for employees who did not make a timely election to keep the information confidential.

In regard to the submitted information that is not subject to section 552.022, section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A government body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the government body receives the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex.

App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588.

In this instance, you explain that the commission, through its Medicaid Integrity division, conducted Medicaid fraud and abuse investigations and issued administrative sanction letters to each of the Medicaid providers in question. You also state that "[e]ach of the providers subsequently sought a formal review of the administrative sanction action," and "[a]ll three of those actions were pending before the State Office of Administrative Hearings (SOAH) on the date the Commission received the current open records request." Finally, you explain that the employees whose personnel files are at issue "have knowledge of the underlying facts in the hearings currently before SOAH," and you assert that the "opposing parties in the litigation could attempt to use information contained in the employees' personnel files to impeach those employees' testimony." Upon review, we conclude that the commission has shown that litigation, in the form of a contested case under the APA, was pending in this matter prior to the receipt of the present request for information. We further conclude that the submitted information relates to the pending litigation for purposes of section 552.103(a). Therefore, the submitted information that is not subject to section 552.022 may be withheld pursuant to section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we conclude that: 1) for employees who timely elected to keep their personal information confidential, you must withhold the submitted social security numbers in the section 552.022 information under section 552.117(a)(1) of the Government Code; 2) all remaining information subject to section 552.022 must be released; and 3) the submitted information that is not subject to section 552.022 may be withheld pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/krl

Ref: ID# 208502

Enc: Submitted documents

c: Mr. Troy Brooks
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(w/o enclosures)